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No. 83-44

In The
Supreme Court of the United States
October Term, 1983

SOLON BAPTIST TEMPLE, INC.,
and Ohio non-profit corporation,

Petitioner,

vs.

THE CITY OF SOLON, a municipal corporation; ARTHUR D. KORKOWSKI, in his capacity as Building Commissioner for the City of Solon; and FRANK G. ZUGAN, in his capacity as Inspector for the Fire Prevention Bureau of the City of Solon,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO

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QUESTIONS PRESENTED

1. Whether the raising of the defense of qualified immunity by municipal officials in an action based upon 42 United States Code § 1983 brought by a church against a municipal corporation and such officials presents material fact issues which cannot be appropriately addressed under pretrial motion procedures.

2. Whether a pleading, which must demonstrate the fulfillment of certain statutory requirements by the complainant, is to be strictly construed and not extended beyond its clear expression when subject matter jurisdiction is dependent upon such fulfillment.

3. Whether a building permit applicant has the right to be notified by the issuing agency of an adverse adjudication order when administrative appeal procedures are available to such applicant.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The City of Solon, Arthur D. Korkowski, and Frank G. Zugan, respondents herein, pray that the writ of certiorari to review the judgment of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio, entered in the above-mentioned case on December 23, 1982, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio, in *The City of Solon, et al. v. Solon Baptist Temple, Inc.* is unreported but is printed in Appendix B hereto, at App. 3, *infra*. The journal entry of the Court of Common Pleas for Cuyahoga County is unreported but is printed in Appendix C hereto, *infra*, at App. 16.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution and the Ohio Revised Code are involved in the questions presented:

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983—Civil action for deprivation of rights. App. 18.

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STATEMENT OF THE CASE

The petitioner is a non-profit Ohio corporation located in the respondent-city. Petitioner purchased a single-family residence in July of 1978 for the purpose of conducting religious services by its pastor, the Reverend Wosnarowski.

On September 8, 1978, the respondents filed suit in Common Pleas Court seeking to have the petitioner's building declared a public nuisance because of the existence of numerous building and fire code violations and to enjoin its use for public assembly. Upon reivew of the record, both the trial court and the Ohio Court of Appeals found "unrebutted documentary evidence of numerous building and fire code violations on the church premises" (See Ohio Court of Appeals Opinion, App. 13). There was no evidence "which would indicate that the code violations [did] not exist . . ." (*Id.* at App. 13). Petitioner counter-

claimed under 42 United States Code § 1983 alleging that the actions of the respondents were in violation of its constitutional rights.

On September 11, 1981, the trial court granted respondents' motion for summary judgment and enjoined the petitioner from using the premises as a place of public assembly only until such time as the building was brought into compliance with the Ohio Building and Fire Prevention Codes.

Under Ohio law, building plans must be submitted to the municipal building department having jurisdiction over the building to determine whether the building meets state requirements. In the present case, respondents disapproved of petitioner's building plans and gave the petitioner a list of building and fire code violations which had to be corrected to bring the premises into compliance with existing regulations.

State law provides a procedure by which the petitioner may appeal this disapproval of its building plans to the Board of Building Appeals. The relevant statutes also afforded the petitioner a right to a hearing before the municipal agency. See Ohio Revised Code §§ 3791.04, 119.06, 3781.19.

In its opinion, the Ohio Court of Appeals carefully analyzed the statutory provisions and ruled as a matter of state law that where a municipal building department disapproves of building plans, a court may issue an appropriate injunction pending an appeal to the Board of Building Appeals or a hearing before the municipal building department. Petitioner failed to avail itself of these administrative remedies, nor was there any evidence that

petitioner attempted to conform the premises to the code regulations.

As for the allegations by the petitioner that its religious freedom was infringed, the Ohio Court of Appeals ruled that since the record demonstrated that the respondents did not act arbitrarily or capriciously and that the petitioner failed to show that the enforcement of the regulations did not bear a substantial relationship to the state's interest in protecting the health and safety of the people, there was no basis to conclude that the petitioner was being harassed or discriminated against because of its religious affiliation (See Ohio Court of Appeals Opinion, App. 13).

The Ohio Supreme Court dismissed the petitioner's appeal, ruling that no substantial constitutional question existed (App. A).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

The Writ Of Certiorari Should Be Denied In That The Decision By The Ohio Court Of Appeals Was Based On State Law, Independent Of Any Federal Question.

Petitioner argues that the defense of qualified immunity under 42 United States Code § 1983 is sufficient to warrant the issuance of the writ. Although the defense of qualified immunity was raised in the respondents' answer to the petitioner's counterclaim, respondents did not argue this issue in the Court of Appeals, nor did the Court

of Appeals decide the case based upon any claim of qualified immunity. In fact, "qualified immunity" was never even mentioned in petitioner's assignments of error to the Court of Appeals, nor do the words appear in the appellate opinion. In short, this case does not present an issue of qualified immunity under a § 1983 claim and therefore cannot form the basis for the issuance of a writ of certiorari.

Additionally, the other arguments raised by the petitioner in support of the writ asks this court to review procedural questions of state law. A scrutiny of the Court of Appeals decision reveals that the case was decided upon a careful analysis of Ohio law.

The United States Supreme Court has repeatedly ruled that certiorari should be denied where the state court decision is "supportable as a matter of state law. . . ." *Maryland v. Baltimore Radio Show,* 338 U. S. 912, 918 (1950). Where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the Supreme Court is without jurisdiction to hear the case if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Jankovich v. Indiana Toll Road Commission,* 379 U. S. 487, 489 (1965); *Cramp v. Board of Public Instruction of Orange County, Florida,* 368 U. S. 278, 281 (1961). "[This] principle applies not only in cases involving state substantive grounds . . . but also in cases involving *state procedural* grounds." *Henry v. Mississippi,* 379 U. S. 443, 446 (1965) (emphasis added). As stated in *Henry*: "[W]e have no power to revise judgments on questions of state law." *Id.* The Supreme Court must accept state courts' construction of a state statute, *Cramp,*

supra at 285, and continually refuse "to decide a federal question in a case that might be controlled by a state ground of decision." *Bell v. Maryland*, 378 U. S. 226, 237 (1964).

In the present case, the Ohio Court of Appeals determined that the evidence supported a finding that the petitioner's building was in violation of health code regulations. [The granting of a writ of certiorari is "not . . . warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures v. Western Electric*, 304 U. S. 175, 178 (1938)]. Additionally, the Ohio court ruled that enjoining the petitioner from having the building used as a public assembly was properly issued in that under *state law* the petitioner failed to exhaust his procedural rights by requesting a hearing before the municipal building department or by appealing to the Board of Building Appeals. As such, the decision below is adequately grounded in state law and therefore is not cognizable in a writ of certiorari.

Also, since the ruling by the Court of Appeals on the issue of religious freedom was not "necessary to the determination of the cause" the writ should be denied. *Honeyman v. Hanan*, 300 U. S. 14, 18 (1937).

II.

The Writ Should Be Denied In That The Case Does Not Present A Substantial Constitutional Question.

The Ohio Court of Appeals ruled that the regulations promoted a significant government interest and the petitioner failed to show any evidence of discrimination based on religious grounds. The United States Supreme Court held in *Poulos v. New Hampshire,* 345 U.S. 395, 405: "[W]e have indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion." As long as the law in question "simply regulates a secular activity" there is no First Amendment violation. *Braunfield v. Brown,* 366 U.S. 599, 605 (1961). First Amendment activities, including those associated with religious beliefs, "are subject to reasonable time, place and manner restrictions." *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647 (1981); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Adderley v. Florida,* 385 U.S. 39 (1966); *Kovacs v. Cooper,* 336 U.S. 77 (1949). "As a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." Citing *Grayned, supra* at 15; *Cox v. New Hampshire,* 312 U.S. 569, 574 (1941). Since safety regulations are routinely enforced against buildings throughout the country, this case presents no substantial constitutional question with respect to the free exercise of religion.

CONCLUSION

WHEREFORE, respondents ask that this court deny the writ of certiorari.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO
1983 Term

To wit April 13, 1983

No. 83-293

THE STATE OF OHIO,
City of Columbus,
The City of Solon, et al.,

Appellees,

vs.

Solon Baptist Temple, Inc.,

Appellant.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS

for Cuyahoga County
To Certify Its Record

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Gibbs & Craze.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19____.

_____Clerk

_____Deputy

THE SUPREME COURT OF OHIO

1983 Term

To wit: April 13, 1983

No. 83-293

THE STATE OF OHIO,

City of Columbus

The City of Solon, et al.,

Appellees,

vs.

Solon Baptist Temple, Inc.,

Appellant.

APPEAL FROM THE COURT OF APPEALS

for Cuyahoga County

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

.....Clerk

.....Deputy

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

No. 44425

APPEAL FROM COMMON PLEAS COURT

No. 989,015

THE CITY OF SOLON, ET AL.,

Appellees,

vs.

SOLON BAPTIST TEMPLE, INC.,

Appellant.

JOURNAL ENTRY AND OPINION

Date December 23, 1982

PARRINO, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Solon Baptist Temple, Inc., defendant-appellant, appeals the entry of summary judgment on both a complaint and a counterclaim in favor of the City of Solon, Solon Building Commissioner Arthur D. Korkowski, and Solon Fire Inspector Frank G. Zugan, plaintiffs appellee.

On September 8, 1978, plaintiffs filed a complaint seeking to have defendant's church building declared a public nuisance because of the alleged existence of building and fire code violations and to have its use as a place of public assembly enjoined.

Defendant answered, asserting as an affirmative defense the failure of plaintiffs to comply with R. C. 3781.031, which sets forth the requirement that a stop order or an adjudication order be issued by any agency before it attempts to enforce, by any civil or criminal remedy, the provisions of Chapters 3781 or 3791 of the Revised Code or any rules or regulations adopted pursuant thereto.

Defendant also counterclaimed, alleging as follows:

> "Plaintiffs have systematically, by infliction of extreme duress and harassment upon Defendant Church, subjected Defendant church to the deprivation by Plaintiffs, under color of law, and the customs and usages of the State of Ohio, of rights, privileges, and immunities secured to Defendant church by the Constitution and laws of the United States, in particular Defendant church's rights to the freedom of religion and association as guaranteed under the First Amendment to said United States Constitution, Defendant church's rights not to be deprived of liberty without due process of law as guaranteed to Defendant church by the Fourteenth Amendment to said Constitution, Defendant church's rights reserved and retained under the Ninth and Tenth Amendments to said Constitution and Defendant church's right to the equal protection of the laws guaranteed under the Fourteenth Amendment of said Constitution."

Defendant cited 42 U. S. C. § 1983 in support of its counterclaim.

On June 27, 1979, defendant moved for summary judgment on plaintiffs' complaint, contending that neither a

stop order nor an adjudication order had been issued to defendant.

Plaintiffs opposed the motion with a brief supported by reports of an inspection of the church premises undertaken by order of the court on August 10, 1979, indicating the existence of numerous building and fire code violations. Plaintiffs also moved for summary judgment on plaintiffs' complaint and defendant's counterclaim.

On February 13, 1980, defendant moved for leave to file an amended counterclaim to name the mayor and the members of City Council of the City of Solon as new parties-defendant in the action.

By journal entry of September 11, 1981, the trial court granted summary judgment in favor of plaintiffs on their complaint and on defendant's counterclaim and enjoined defendant from using the church premises as a place of public assembly until such time as the building is brought into compliance with the Ohio Building Code and Fire Prevention Code.[1]

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[1]The judgment entry indicates that the trial court had before it for its consideration in ruling on the motion for summary judgment *inter alia* "the depositions of Marion Wojnarowski, Arthur D. Korkowski, and Frank G. Zugan."

However, while complete depositions of Mr. Korkowski and Mr. Zugan were filed and are a part of the record on appeal, only a partial deposition of the Reverend Wojnarowski, attached to defendant's motion for summary judgment, is of record. The docket sheet, while it indicates the filing of the Zugan and Korkowski depositions, includes no such entry with respect to the deposition of Reverend Wojnarowski.

We shall therefore assume that the trial court had before it, when ruling on the motion, only the partial rather than the complete deposition of Reverend Wojnarowski.

Defendant assigns four errors on appeal. Because they can be more conveniently treated together, we shall consider defendant's first three assignments of error separately from the fourth.

> "1. Upon consideration of the evidence in support of and in opposition to the City of Solon's Motion for Summary Judgment, the lower court erred in permanently enjoining Solon Baptist, its officers, agents, employees, successors and assigns, from utilizing its structure located at 7669 SOM Center Road as a place of public assembly until such time as said structure is brought into compliance with the Ohio Building Code and Fire Prevention Code as administered by appellee.
>
> "2. Upon consideration of the evidence in support of and in opposition to the City of Solon's Motion for Summary Judgment, the lower court erred in dismissing Solon Baptist's Counterclaim with prejudice."
>
> "3. In granting the City of Solon's Motion for Summary Judgment, the lower court erred in finding that there is no genuine issue as to any material fact in this case and that appellee is entitled to judgment as a matter of law."

In his arguments in support of these assignments of error, defendant in fact raises only two issues.

Defendant first contends that the trial court erred in granting summary judgment in favor of plaintiffs on their claim because there exists a genuine issue of material fact as to whether a stop order or an adjudication order had been issued to the defendant.

R. C. 3781.031 requires either of such orders to have been issued before an attempt is made to enforce the provisions of Chapters 3781 or 3791:

"3781.031 Issuance of adjudication orders and stop work orders.

"Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein."

Plaintiff Korkowski gave testimony by way of deposition that in July of 1978 he placed a red tag on the door knob of the front door of the church building (Dep. of Korkowski, p. 44). He also stated that a red tag, in his opinion, is the same as a stop work order (Dep. of Korkowski, p. 44) and that he wrote on the tag that work on the premises should be discontinued until a building permit was obtained (Dep. of Korkowski, p. 49). He admitted that the Building Department has a standard stop work order form but he did not use one on the day he left the red tag because he did not have one available.

Reverend Wojnarowski gave testimony by way of deposition as follows:

"Q. During the period of time somewhere in that neighborhood, those dates, Tuesday, Wednesday or Thursday, did you ever have occasion to find a stop work order placed on the house?

"A. No, sir. We had no indication at all that there was any kind of a stop work order, verbal or written, issued to us. We never found anything, there was nothing on the building. No one ever received anything, nobody saw anything." (Dep. of Wojnarowski, pp. 27-28).

He also stated that a "no occupancy" sticker was placed on the church building.

This depositional evidence does suggest the existence of a genuine issue of fact as to whether plaintiffs issued a stop work order to defendant prior to the initiation of court action against the defendant.

However, if the record demonstrates that an adjudication order was issued to the defendant, the question of whether a stop work order was issued is not a "material" factual issue within the meaning of Civ. R. 56(C) because a finding in favor of the defendant on that issue would not preclude a summary judgment in plaintiffs' favor.

R. C. 3791.04 prohibits the owner of a building used as a place of assembly from proceeding with the construction or alteration of such building until plans or drawings for the construction or alteration thereof are submitted for approval to the municipal building department having jurisdiction over the building. Such approval shall not be given unless the building, as altered, would meet the requirements set forth in Chapters 3781 and 3791 of the Revised Code and any rule made pursuant thereto.

It is further provided under R. C. 3791.04 as follows:

> "The approval of plans and specifications . . . under this section is a 'license' and the failure to approve such plans or specifications as submitted . . . within thirty days after the plans or specifications are filed . . . or the disapproval of such plans and specifications . . . is 'an adjudication order denying the issuance of a license' requiring an 'adjudication hearing' as provided by sections 119.07 to 119.13 of the Revised Code and as modified by sections 3781.031 (3781.03.1) and 3781.19 of the Revised Code. An adjudication order denying the issuance of a license shall specify the reasons for such denial."

R. C. 3781.031 also sets forth requirements of an adjudication order in the following terms:

> "Every adjudication order shall specify what appliances, site preparations, additions, or alterations to structures, plans, materials, assemblages or procedures are necessary for the same to comply with Chapters 3781. and 3791. of the Revised Code."

As these statutes indicate, the disapproval of building plans and specifications constitutes an adjudication order. To be effective, such an order must specify the reasons for the disapproval and indicate what plans and alterations are necessary for the building to be in compliance with Chapters 3781 and 3791.

The record demonstrates that defendant's building plans, submitted in support of his application for a building permit, were disapproved by plaintiff Korkowski and that defendant was given a list of building and fire code violations which had to be corrected to bring the church premises into compliance with code provisions (Dep. Zugan, p. 10; Dep. Korkowski, pp. 18, 23, 35, 37-39, 49, 60-61, 65; Exhibits B, C, and D attached to complaint and referred to in depositions).

Defendant, however, contends that it was not afforded an "adjudication hearing" as required by R. C. 3791.04.

R. C. 3781.19 makes clear that the "adjudication hearing" referred to in R. C. 3791.04 is that granted before the Board of Building Appeals to which defendant may appeal the disapproval of his building plans. R. C. 3781.19 pertinently provides:

> "The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code, which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 (3781.03.1) of the Revised Code."

Therefore, defendant had a right to appeal the disapproval of his plans but the initial disapproval was itself an effective "adjudication order" pending appeal.

This conclusion is reinforced by the language of R. C. 119.06:

> "No adjudication order shall be valid unless an oportunity for a hearing is afforded in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order *except in those situations where this section provides otherwise.*
>
> "The following adjudication orders shall be effective without a hearing:
>
> • • •
>
> "(C) *Orders or decisions of an authority within an agency if* the rules of the agency or *the statutes pertaining to such agency specifically give a right of appeal* to a higher authority within such agency or *to another agency and also give the appellant a right to a hearing on such appeal.*" (Emphasis added).

Since defendant does have a right to appeal to another agency, *i.e.*, the Board of Building Appeals, and a right to a hearing on such appeal, the adjudication order is effective without a hearing.

The following language of R. C. 3781.031 further supports this conclusion:

> "*Before any department or agency of* the state or *any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto* by any remedy, civil or criminal, *it shall issue an adjudication order* within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein." (Emphasis added).

It is implicit in the language of this statutory provision that a municipal building department may itself issue an adjudication order which would counter the argument that the only adjudication order to which reference is made in Chapters 3781 and 3791 is that issued by the Board of Building Appeals after a hearing before that body.

To hold that the disapproval of plans by a municipal building commission is not an adjudication order would permit the building permit applicant to control the municipality's ability to initiate court action simply by failing to appeal the disapproval of its plans.

Furthermore, we note that a permit applicant may, if he so chooses, in addition to his right to appeal to the board of building appeals, request a hearing before the municipal building department. This option is provided for under R. C. 119.06:

> "Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license."

We conclude, therefore, that the record demonstrates that an effective, though appealable, adjudication order was issued to the defendant upon disapproval of his building plans and, therefore, the subsequent initiation of court action under R. C. 3781.15 was proper.

Finally, plaintiffs also base their claim for judicial relief upon R. C. 3737.44.

This provision, having become effective on July 1, 1979, subsequent to the initiation of the present suit, is, as defendant contends, inapplicable to this action.[2]

The second issue raised by defendant in support of its first three assignments of error is whether the trial court erred in granting summary judgment to plaintiffs on defendant's counterclaim which was based upon 42 U. S. C. § 1983:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

As the excerpt from defendant's counterclaim set forth at the beginning of this opinion indicates, defendant alleges, in a conclusory fashion, the violation of a number of constitutional rights.

Assuming *arguendo* that defendant, as a corporation, has standing to assert on its own behalf, the violation of individual constitutional rights such as freedom of religion and association and to seek recovery for alleged infliction

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[2]We do not address the issue of whether R. C. 3737.44 may be given retroactive effect under the theory that it is remedial in nature since plaintiffs did not make such an argument nor cite authority in support thereof.

of physical and mental duress upon the Reverend Wojnarowski, not a party to this action, issues which we specifically do not decide, still we find defendant's contention to be without merit.

The record contains unrebutted documentary evidence of the numerous building and fire code violations on the church premises.

On the other hand, defendant submitted no evidentiary material in support of its counterclaim. There is therefore contained in the record no evidence which would indicate that the code violations do not exist, that the requirements set forth in the code provisions do not bear a substantial relationship to the compelling state interest of protecting the health and safety of those using the church, or that the enforcement of the code provisions was arbitrary or capricious or was such that an inference could be drawn that defendant was being harassed or discriminated against because of its religious affiliation.

The second issue raised by the defendant is therefore devoid of merit.

> "4. The lower court erred in failing to rule on Solon Baptist's Motion for Leave to Allow the filing of an Amended Counterclaim."

This assignment of error is not well taken.

By entering judgment in favor of the plaintiffs and dismissing defendant's counterclaim, the trial court implicitly overruled defendant's motion for leave to file an amended counterclaim. *See Lichtenstein v. L. Fish Furniture Co.* (Ill. S. Ct., 1916), 272 Ill. 191; Ill. N. E. 729, 731 (where court proceeds to trial of an action on counts

against which demurrer was filed, express overruling of demurrer is unnecessary); *Re Automobile Liability Ins. Rates* (Vt. S. Ct. 1969), 128 Vt. 73, 258 A. 2d 826, 830 (where court proceeded to dispose of merits of case without oral argument, court impliedly overruled motion for oral argument); *see also Hayes v. Smith* (1900), 62 Ohio St. 161 (where court fails to rule on objection, it will be presumed to have overruled objection).

Furthermore, although defendant does not expressly argue the point, we do not believe that the trial court erred in overruling defendant's motion for leave to amend.

While defendant filed a motion for leave to file an amended counterclaim on February 13, 1980, that motion referred to the proposed amended counterclaim as "Exhibit A". However, no such Exhibit A was found attached to the motion. Defendant did file a document entitled "Defendant Church's Amended Complaint." However, that was filed on October 22, 1979, prior to the filing of the motion and therefore out-of-rule. Moreover, it does not, in its caption, list the proposed additional parties-defendant set forth in defendant's motion.

Given the confusing manner in which defendant raised the issue and the failure of defendant to submit evidence in the summary judgment proceeding in support of its counterclaim as originally drawn, the court cannot be said to have abused its discretion in overruling defendant's motion for leave to amend the counterclaim to name additional parties-defendant and pray for additional damages.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P.J.,
JACKSON, J., CONCUR

/s/ Thomas J. Parrino,

Judge

THOMAS J. PARRINO

For plaintiff-appellees: Charles T. Riehl
and Thomas G. Longo

For defendant-appellant: Charles E. Craze

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX C

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 78-989015

CITY OF SOLON, et al.

Plaintiffs

vs.

SOLON BAPTIST TEMPLE, INC.

Defendant

(Filed September 11, 1981)

JOURNAL ENTRY

This matter was heard on Defendant's Motion for Summary Judgment and supporting Brief, and the Plaintiffs' Cross-Motion for Summary Judgment; Brief in Support for Cross-Motion for Summary Judgment; and Brief in Opposition to Motion for Summary Judgment filed by Defendant. Upon consideration of the pleadings on file, the Motions and Briefs, the Affidavits attached thereto, and the depositions of Marion Wojnarowski, Arthur D. Korkowski, and Frank G. Zugan, together with Exhibits attached thereto, the Court finds that there is no genuine issue as to any material fact in this case and that the Plaintiffs are entitled to judgment as a matter of law. Accordingly, this Court concludes that, pursuant to Ohio Civil Rule 56, summary judgment should be granted for Plaintiffs on their claim against the Defendant and summary judgment should be granted for the Plaintiffs denying the Defendant's Counterclaim.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) That judgment is hereby rendered in favor of Plaintiffs on the claims asserted in the Complaint against the Defendant and the Defendant, its officers, agents, employees, successors and assigns, be and are hereby permanently enjoined from utilizing its structure located at 7669 SOM Center Road, Solon, Ohio, as a place of public assembly until such time as said structure is brought into compliance with the Ohio Building Code and Fire Prevention Code as administered by the Plaintiffs.

(2) That judgment is hereby rendered in favor of Plaintiffs on the claims asserted in the Defendant's Counterclaim and said Counterclaim be, and the same hereby is, dismissed with prejudice.

(3) That the Defendant bear the costs of this action.

IT IS SO ORDERED.

/s/ James J. McGettrick,
Judge.

APPENDIX D

42 U. S. C. § 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284).

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AGENCY POWERS

119.06 *Adjudication order of agency valid and effective; hearings; periodic registration of licenses.*

No adjudication order of an agency shall be valid unless said agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Order or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency or to another agency and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license.

When periodic registration of licenses is required by law the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

* * *

119.12 *Appeal by party adversely affected.*

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in Ohio, he may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may

appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal, issued under Chapter 3737, of the Revised Code, may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation or the department of tax equalization.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. In the event an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board, the

court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the liquor control commission suspending or revoking a permit issued under Chapter 4303, of the Revised Code shall terminate not more than fifteen months after the date of the filing of notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than fifteen months after the date of the filing of notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Within thirty days after receipt of notice of appeal from an order in any case wherein a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed shall, upon motion, cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense thereof shall be taxed as a part of the costs on the appeal. The appellant must provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil ac-

tion, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provided in sections 2505.01 to 2505.45 of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record. Such appeals may be taken regardless of the fact that a proceeding was pending prior to the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice

of appeal within the time prescribed by section 2505.07 of the Revised Code.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

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3781.031 *Issuance of adjudication orders and stop work orders*

Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein.

Any person charged with the duty of enforcing Chapters 3781. and 3791. of the Revised Code or the rules or regulations adopted pursuant thereto may issue a stop work order whenever he finds, after inspection, that the site preparations or structure to be constructed, or in the case of an industrialized unit, the installation of the unit, or that the use of an appliance, material, assemblage or manufactured product does not comply with the provisions of Chapters 3781. and 3791. of the Revised Code or the rules or regulations adopted pursuant thereto. The effect of such an order shall be limited to the matter specified therein.

Every adjudication order shall specify what appliances, site preparations, additions, or alterations to structures, plans, materials, assemblages or procedures are nec-

essary for the same to comply with Chapters 3781. and 3791. of the Revised Code.

Upon the issuance of any order provided for herein, the person receiving such order shall cease work upon the site preparations or structure to be constructed, or in the case of an industrialized unit, the installation of the unit, or shall cease using the appliance, materials, assemblages or manufactured produce identified in the order until such time as the appeal provided for in accordance with the provisions of section 3781.19 of the Revised Code, and all appeals from such hearing have been completed, or the order issued herein has been released.

Notwithstanding the provisions of Chapter 119. of the Revised Code relating to adjudication hearings and the proceedings thereon, a stenographic or mechanical record of the testimony and other evidence submitted shall be taken at the expense of the agency; a party adversely affected by an order issued following such adjudication hearing may appeal to the court of common pleas of the county in which he is a resident or in which the premises affected by such order is located; the court in such case shall not be confined to the record as certified to it by the agency but any party may produce additional evidence and the court shall hear the matter upon such record and such additional evidence as is introduced by any party; and the court shall not affirm the order of the agency unless the preponderance of the evidence before it supports the reasonableness and lawfulness of such order and of any rule or regulation of the board of building standards upon which the order of the agency is based in its application to the particular set of facts or circumstances involved in the appeal.

Failure to cease work after receipt of a stop work order is hereby declared a public nuisance.

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3781.15 *Injunction proceedings*

The construction, use, or occupation of any building which is declared by sections 3781.06 to 3781.18, inclusive, section 3781.031, and section 3791.04 of the Revised Code, to be a public nuisance may be enjoined in a proceeding instituted in the name of any department or officer mentioned in section 3781.03 of the Revised Code in the court of common pleas of the county in which said building is or will be situated.

Ohio Revised Code § 3791.04—Submission of plans; approvals; prohibitions; penalties.

> The approval of plans and specifications . . . under this section is a "license" and the failure to approve such plans or specifications as submitted . . . within thirty days after the plans or specifications are filed, . . . or the disapproval of such plans and specifications, . . . is "an adjudication order denying the issuance of a license" requiring an "adjudication hearing" as provided by sections 119.07 to 119.13 of the Revised Code and as modified by sections 3781.031 (3781.03.1) and 3781.19 of the Revised Code. An adjudication order denying the issuance of a license shall specify the reasons for such denial.

Ohio Revised Code § 3781.19—Board of Building Appeals created; members.

> The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code, which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 (3781.03.1) of the Revised Code.